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No. 99-1683

Supreme Court, U.S.
FILED
MAY 24 2000
CLERK

In The

Supreme Court of the United States

YANKTON SIOUX TRIBE, and its individual members, United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,

Petitioners,

v.

MATT GAFFEY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF STATE AND LOCAL GOVERNMENT PARTIES

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OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 188 F.3d 1010 (8th Cir. 1999), and is reprinted in the Appendix to the Petition for Writ of Certiorari in *South Dakota, et al. v. Yankton Sioux Tribe, et al.*, No. 99-1490 (hereinafter State's Petition), at App. 1-49. All references to "App." herein are to that Appendix.[1] The Memorandum Opinion and Order of the United States District Court for the District of South Dakota are reported at 14 F. Supp. 2d 1135 and are reprinted at App. 50-113.

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit was entered on August 31, 1999. The Eighth Circuit denied timely petitions for rehearing and suggestions for rehearing en banc on December 8, 1999. App. 114.

STATEMENT OF THE CASE

Respondents submit that the "Statement of the Case" submitted by Petitioners here is inadequate and incorporate by reference the "Statement of the Case" set out in the State's Petition for Writ of Certiorari in No. 99-1490, at 3-11.

[1] The Petition filed by the Tribe in No. 99-1683 did not contain the appendices required by Supreme Court Rule 14.1(i).

REASONS FOR DENYING CERTIORARI

The tribal Petitioners request certiorari in this case with the end of overturning the court of appeals' determination that lands originally allotted to individual Indians and subsequently transferred to non-Indians do not constitute a "reservation" under 18 U.S.C. § 1151(a).

Certiorari should be denied. First, there is no conflict between the state and federal courts on this issue. They agree that the former "allotted" lands are neither "reservation" nor "Indian country." Second, as the United States acknowledges, there is no conflict among the federal courts with regard to the issue presented. U.S. Brief in Opp. 25-26. Third, turning to the merits, certiorari should not be granted because the Yankton reservation has, in fact, been disestablished; therefore, the tribal claim that allotted lands which have lost "Indian title" within the former reservation themselves constitute a "reservation" is necessarily in error. Finally, certiorari is not merited merely because the court below used incorrect language in its opinion. The court below came to the right result despite that language.

A. THERE IS NO CONFLICT BETWEEN THE FEDERAL AND STATE COURTS ON THE ISSUE WHETHER FORMER ALLOTTED LANDS CONSTITUTE A "RESERVATION."

The court of appeals clearly found that former allotted lands within the 1858 reservation constitute neither "Indian country" nor a "reservation." App. 47. The South Dakota Supreme Court, in finding the Yankton Reservation "terminated," *Bruguier v. Class*, 599 N.W.2d 364 (S.D.

1999) (App. 169, 171) necessarily found that the former allotted lands were not "reservation." Thus, there is no conflict between the state and federal courts on this issue, and none is alleged to exist.[2]

B. THE OPINION OF THE EIGHTH CIRCUIT IS NOT IN CONFLICT WITH ANY DECISION OF THE TENTH CIRCUIT COURT OF APPEALS.

The Tribe has not cited a single case of this Court or of a court of appeals in which a "cession and sum" agreement resulted in a "reservation" in the bizarre configuration it urges, including unextinguished allotted lands, extinguished allotted lands, and ceded lands once agency lands, but not other ceded lands. The Tribe has, therefore, settled on *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *cert. denied*, 522 U.S. 1107 (1998) (*Ute Indian Tribe II*), as the case on point. Indeed, the Tribe claims that *Ute Indian Tribe* is in "direct conflict" with the opinion below. *See* Tribe's Pet. 20. We agree with United States, however, that *Ute Indian Tribe* is without legal relevance. *See* U.S. Brief in Opp. 25-26.

In *Ute Indian Tribe II*, the Tenth Circuit Court of Appeals in 1997 considered the question of the extent to which a 1985 decision of the court of appeals in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986) (*Ute Indian Tribe I*) should be applied under the doctrine of "finality," regardless of the

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[2] The conflict between the federal and state courts addressed in the State's Petition for Certiorari in No. 99-1490 concerns the larger issue of whether the reservation has been wholly disestablished.

Supreme Court's later decision in *Hagen v. Utah*, 510 U.S. 399 (1994). *Ute Indian Tribe II*, 114 F.3d at 1521, in 1997 held that because the court's 1985 decision in *Ute Indian Tribe I* constituted a "final decision, a later change in law could not 'reopen the door already closed.' " That reasoning is entirely inapplicable here, even assuming that *Ute Indian Tribe II* was correctly determined. There is no question of a final judgment precluding relief here.

C. BECAUSE THE YANKTON SIOUX RESERVATION HAS BEEN "TERMINATED," FORMER ALLOTTED LANDS MAY NO LONGER CLAIM "RESERVATION" STATUS UNDER 18 U.S.C. § 1151(a).

1. *Yankton Sioux Tribe* Found That the Terms of the Yankton Agreement Parallel Language That Terminated the Lake Traverse Reservation; the Lower Courts Had No Alternative but to Likewise Find the Yankton Reservation Terminated.

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998), this Court (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975)) held that the " 'cession' and 'sum certain' language" of Articles I and II of the Yankton Agreement "is 'precisely suited' to terminating reservation status." The Court continued:

> The terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*. . . .

Id. at 344. This Court did not itself determine that the Yankton Reservation was "disestablished . . . altogether," noting that it "need not determine" that issue. 522 U.S. at

358. Nonetheless, the language of this Court was so definitive that, after *Yankton Sioux Tribe*, the lower courts were bound to find the Yankton reservation terminated in the absence of some overwhelming showing of fact or law. No claim, however, can be made that anything in the facts or law allows the lower courts to overcome the *Yankton* language. Thus, the Yankton Sioux Reservation, like the Lake Traverse Reservation, has been "terminated."[3] Moreover, there can be no doubt as to the meaning of "terminated." *DeCoteau*, 420 U.S. at 446-47, found that the result of termination there was that

> exclusive tribal and federal jurisdiction is limited to the *retained* allotments. 18 U.S.C. § 1151(c). *See United States v. Pelican*, 232 U.S. 442.

(Emphasis added.) *See also DeCoteau*, 420 U.S. at 427 n.2. It follows, from *Yankton* and *DeCoteau*, that the Yankton Reservation, like the Sisseton Reservation, has been "terminated."

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[3] Petitioners and the United States complain that the Yankton Agreement could not have "terminated" the entire reservation because the cession and sum certain language applied only to the "ceded" lands and was irrelevant to the other lands. However, the cession and sum certain language of the Lake Traverse and Yankton Agreements is virtually identical in this regard. *See DeCoteau*, 420 U.S. at 456; App. 128-29. The complaint of the Petitioners and the United States is actually with *DeCoteau* itself.

2. Because the Yankton Reservation Was "Terminated," Allotted Lands Lost "Indian Country" Status When Their "Indian Title" Was "Extinguished."

Because the Yankton reservation was terminated, the court below did not err in finding that "allotted" lands lost "Indian country" status when their Indian title was extinguished. 18 U.S.C. § 1151(c), in fact, defines "Indian country" to include "all Indian allotments, the Indian titles to which have not been extinguished. . . . " Thus, when the "Indian title" to the "allotments" *is* "extinguished," the lands lose their "allotted" status and the "Indian country" status attached to the "allotted" status. *See United States v. Stands*, 105 F.3d 1565, 1572 (8th Cir. 1997), *cert. denied*, 522 U.S. 841 (1997) (allotted lands outside of reservation boundaries "retained their allotment status, and they remain Indian country today *unless their Indian titles have been extinguished*") (emphasis added). The court below was therefore correct in finding that the allotted lands lost "Indian country" status when their "Indian title" was extinguished.[4] *See also Alaska v. Native Village of Venetie*, 522 U.S. 520, 528-30 (1998) (discussing origin and meaning of 18 U.S.C. § 1151(c)).

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[4] If the "allotted lands" *had* been found on a "reservation" as defined by 18 U.S.C. § 1151(a), they also would have lost their "allotted" status under 18 U.S.C. § 1151(c) when the Indian title was extinguished; nonetheless, they would have retained their "Indian country" status as part of a "reservation." This is because the transfer of ownership of lands on a reservation does not alter their "reservation" status. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

To demonstrate that the court below came to the wrong result in finding the allotted lands did not retain their "Indian country" status when transferred to non-Indians, the Tribe and the United States are therefore compelled, in effect, to reject this Court's finding that *Yankton Sioux Tribe* found that *DeCoteau* was on point and to argue that the Yankton Reservation was not "terminated." They fail in this attempt.

3. The Attempt to Distinguish *Yankton* and *DeCoteau* Fails.

Petitioners and the United States essentially ignore the central language of *Yankton* and *DeCoteau* set forth above. Each instead implicitly requests that this Court jettison its own finding of the legal identity between the two agreements and rely upon the supposed distinguishing factual characteristics. *See* Tribe's Pet. 10; Tribe's Brief in Opp. 11-13; U.S. Brief in Opp. 16-19. But the rulings of this Court may not be so easily defeated, and in any event, the so-called distinguishing characteristics do not stand up to close analysis.

a. The Yankton Indians Clearly Expressed a Desire To "Terminate" Their Reservation.

The Tribe and the United States rely heavily on the argument that the Sisseton Indians expressed a desire to terminate their reservation, but the Yankton Indians did not. This analysis is untenable in light of the passage from *Yankton Sioux Tribe* quoted above which finds that the very language of the Yankton Agreement was " 'precisely suited' " to "terminating" the reservation. *Yankton*

Sioux Tribe, 522 U.S. at 344. The language of an agreement, of course, is the very best source of a party's intentions.

The argument that the Yankton negotiations did not demonstrate a tribal intention to disestablish the reservations is, moreover, refuted by this Court's finding that the "Commissioner's report of the negotiations signaled their understanding that cession of the surplus lands *dissolved tribal governance of the 1858 reservation*." 522 U.S. at 353 (emphasis added). This Court also quoted the language of a critical letter written by three Yankton Chiefs and more than 100 members of the Yankton Tribe to Congress stressing, inter alia, that they wanted the " 'laws of the . . . State we live in to be recognized and observed,' " a concept totally incompatible with a desire to retain reservation status. 522 U.S. at 353 (quoting S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894)). These passages are clearly equivalent to those claimed by the United States and the Tribe to be of importance in *DeCoteau*.[5]

b. The Remaining Provisions of the Yankton Agreement Strongly Argue for Disestablishment.

Contrary to arguments made here, the remaining articles of the 1894 Agreement, i.e., those other than the

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[5] The implicit argument of the Petitioners is that language of an Agreement is a blank slate upon which it, the United States, or the courts can write whatever seems convenient 100 years later by extracting bits of history from a variety of sources. The law, however, turns to the language of the agreements as having the critical meaning.

critical "cession and sum certain" articles, argue even more strongly for disestablishment than did the remaining articles of the Lake Traverse Agreement. The majority of the remaining provisions of the 1894 Agreement set out a method of payment during the twenty-five year trust period, indicating an understanding that the government's interest would extend only through that time – i.e. the twenty-five year *trust allotment* period, and not permanently, as in the care of a "reservation." *See generally DeCoteau*, 420 U.S. at 432, 434, 441 (operation of the General Allotment Act in the context of the Lake Traverse disestablishment). In particular, Articles III and IV (App. 129-30) set up a payment plan for the $500,000 which remained after the first $100,000 was paid. Article IV tied the entire payment scheme to the twenty-five year trust period and provided that the $500,000 should be payable "at the pleasure of the United States after twenty-five years. . . . " App. 130. The section stated that "during the trust period of twenty-five years" the United States could pay part of the principal sum as the Secretary of the Interior might recommend. *Id.*

Article V set up the possibility of a fund from the "interest" due on the remaining payments. *Id.* The United States has argued that this fund is persuasive of permanent "reservation" status. However, the "interest" would be due on the funds *only* for the twenty-five year period in which the United States would hold them. *Id.* Moreover, the fund was "discretionary" with the Secretary of the Interior, and he did not, in fact, set up any fund. *Yankton Sioux Tribe v. United States*, 623 F.2d 1159, 1181-82 (Court of Claims 1980). Article V, in turn, is tied to Article XI (App. 133-34), which provided that if any member of

the Tribe "shall within twenty-five years die without heirs," his property would be sold and the funds added to the Article V fund. Article XI thus provides funding only during the twenty-five year trust period and allows the sale of "allotted lands" on the death of allottees without heirs during that twenty-five year period. It contemplated a diminution, even during the twenty-five year trust period, of the amount of land held by Indians. Similarly, Article IX provided that during the "trust period of twenty-five years" the superintendent of the agency could approve the leasing of certain lands owned by allottees. App. 132. That authority *expired*, by its terms, however, at the end of the twenty-five year trust period.

Nor does Article VIII (App. 132) of the Yankton Agreement distinguish the *Yankton* case from *DeCoteau*. Article VIII simply provided that a small amount of land *ceded* by the Tribe to the government, and paid for by the government, would be reserved from sale to settlers "until they are no longer required" for the agency purposes. *Id.* This does not distinguish the cases, however, *for the United States also retained lands for an agency and schools at Lake Traverse, a fact not denied by any party. See, e.g.*, Ex. 572 (1898 Indian agent makes references to "agency headquarters" at Lake Traverse, to "location of the agency buildings," to a boarding school, and to a farm tract comprised of "480 acres of good land," forty of which were in cropland. *See also DeCoteau*, 420 U.S. at 435 n.16 (" 'the Government should own the lands upon which the agency and school buildings are located' ").

It is not surprising, moreover, that lands were retained in both areas because services would have to be

provided regardless of "reservation" status. *See DeCoteau*, 420 U.S. at 442; 1998 Transcript 47 (former Lake Traverse Superintendent and present Yankton Superintendent testify that services provided in two areas were "comparable"). *See also Native Village of Venetie*, 522 U.S. at 534 ("mere provision" of benefits does not support finding of "Indian country").

Similarly, the United States has seized on this Court's comment regarding Article VIII as decisive. In the passage relied upon, *Yankton Sioux Tribe*, 522 U.S. at 350, reference is made to "virtually identical" language[6] in *Solem v. Bartlett*, 465 U.S. 463, 474 (1984), which ultimately found the reservation there *not* to be diminished at all. The *Yankton* Court, however, *has found* the Yankton reservation to be at least diminished; it has thus weighed, and found wanting, the impact of the provision in the context of the Yankton "cession and sum certain" agreement (as opposed to a "sell and dispose" agreement at issue in *Solem*).

Finally, the United States continues to argue that because the gross amount of land ceded in *DeCoteau* was

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[6] We respectfully submit that the provisions are not "virtually identical." In *Solem*, the lands were simply reserved from sale to the settlers; the Tribe actually retained ownership of the lands and received no consideration for them. At Yankton, the lands were "ceded" by the Tribe to the United States for payment. App. 20. Moreover, in the Yankton case, Congress ultimately rid the United States of the agency lands when they were no longer needed for agency, school, and similar purposes. *See* Ex. 627.

greater than in *Yankton*, the cases should be distinguished. The United States has not identified any precedent establishing this difference. In any event, the more important statistics establish that the actual amount of land *retained* in allotted status in the two former reservations was about equal: 256,000 acres in Sisseton, *see DeCoteau*, 420 U.S. at 435 n.16, and 262,000 acres at Yankton. *Yankton*, 522 U.S. at 336. Moreover, the *per capita* land retained in allotted status was quite similar, 152 acres per capita at Sisseton and 168 acres per capita at Yankton. (Figure derived from acreage statistics set out above and 1890 census at Ex. 610.)

4. Disestablishment Also Flows From the Finding That the 1858 Boundaries Were Eliminated.

A finding of disestablishment also necessarily follows from the fact that the 1858 reservation boundaries were eliminated by the 1894 Act. *Yankton Sioux Tribe*, 522 U.S. at 345 states: "The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." This Court also found that the record contained "no discussion of the preservation of the 1858 boundaries." *Id.* at 347. The court below thus correctly concluded that "the 1858 reservation boundaries did not remain intact following passage of the 1894 Act." App. 25. The record is likewise clear there were no discussions of any *changed* or *new* boundaries. *See, e.g.*, App. 37; App. 73. It follows that the parties must not have intended to create new boundaries.

As demonstrated above, the courts have consistently recognized the importance of the discussion of the boundary issue in determining "reservation" status. Here there is none. Nor is it sufficient to simply *imply* that *new* boundaries were permanently set around the "allotted lands" which are noncontiguous and in some cases quite scattered. *See* Gov't. Ex. 3 (map). There is no evidence that the government negotiators or the Tribe believed that these lands constituted a permanent "reservation." They did not say so, and such was not the experience of the Yankton Sioux Tribe. *See* Treaty of 1858 (App. 115). Nor was there *any* other contemporaneous example cited by the Tribe or any negotiator in 1892 in which scattered, noncontiguous "allotted" lands constituted a "reservation." In short, there is no way the negotiators, the Tribe, or the Congress could recognize what is now being posited as a permanent "reservation" to be such. It follows that the taking down of the boundaries, a fact found by this Court and acknowledged by the Eighth Circuit, strongly counsels a finding of disestablishment, for if there are no "reservation boundaries" there is no "reservation."[7]

Finally, as set forth above, when the "Indian title" to "allotted" land outside a reservation is "extinguished", its "Indian country" status is lost. 18 U.S.C. § 1151(c). The court below thus came to the correct conclusion that the

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[7] There may, of course, be other kinds of "Indian country" in this area such as "allotments" whose Indian titles are not "extinguished" or "dependent Indian communities." *See* 18 U.S.C. § 1151(b) and (c); *Native Village of Venetie*, 522 U.S. at 528-31.

"allotted" lands at issue *here* lost their "Indian country" status when their "Indian title" was "extinguished." *See* Section C.2, *supra*.

D. THE AMBIGUITY AND OCCASIONAL INCORRECT USE OF LANGUAGE BY THE COURT OF APPEALS DOES NOT REQUIRE THIS COURT'S INTERVENTION BY WAY OF GRANT OF A WRIT OF CERTIORARI WITH REGARD TO FORMER ALLOTTED LANDS, BECAUSE THE COURT BELOW REACHED THE RIGHT RESULT.

It is true that the court of appeals erred in its use of certain Indian law terminology. In particular, the court of appeals erred when it inappropriately referred to the "allotted lands" which remained in Indian hands after 1894 as "reservation." *See, e.g.*, App. 43. The Tribe attempts to bootstrap the error into grounds which demand the grant of certiorari with regard to the allotted lands which then *left allotted status*, the lands at issue here. Tribe's Pet. 6.

However, no action of this Court is necessary to correct the error in the court's language because the court below at App. 47 came to the right *result* with regard to former allotted lands;[8] i.e., the "allotted" lands lost "Indian country" status at the time their Indian title was extinguished. *See* 18 U.S.C. § 1151(c).[9] This necessarily

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[8] For analogous reasons, the Tribe is incorrect in arguing that certiorari is merited because the decision below "conflicts with 18 U.S.C. § 1151(a)." Tribe's Petition 15-17.

[9] The court below may have assumed that because "allotted lands" were treated as "Indian country" after 1894, they must be

follows with regard to any former allotted lands found outside of a reservation. *See also,* Section C.2, *supra.*

As we have demonstrated, there is no conflict between the state and federal courts with regard to the former allotted lands, nor is there a conflict among the federal courts. If the decision below is left intact with regard to the former allotted lands, the lands will continue to be treated as they have been treated for the last century – i.e., as areas not constituting "Indian country" and as within the State's jurisdiction, a fact that all of the courts have acknowledged. *See, e.g.,* App. 45.

Thus, tribal request for a grant of certiorari, a request premised on the former allotted lands, should be rejected as imposing an unnecessary burden upon this Court and the parties. *See also,* U.S. Brief in Opp. 21-23 (opposing certiorari).

"reservation." The reasoning would miss the point that the "Indian country" status of the "allotments" attached because of their "allotted" status, not because of a "reservation status." As *Native Village of Venetie,* 522 U.S. at 528-29, confirms, allotments were sometimes carved out of diminished reservations and remained "Indian country" as "allotments" and not as "reservations"; the United States retains its obligation of " 'governmental care' " for the areas. That status lasts only so long as the "Indian title" remains unextinguished, however. 18 U.S.C. § 1151(c); *Stands,* 105 F.3d at 1572.

CONCLUSION

The Tribe's Petition should be denied.

Respectfully submitted,

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